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Advocates for the Disabled, or Extortionist Vampires? Chapter 383 Attempts to Prevent Plaintiffs' Attorneys from Bleeding Small Businesses Dry

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Civil

Advocates for the Disabled, or Extortionist Vampires? Chapter 383 Attempts to Prevent Plaintiffs' Attorneys from Bleeding Small Businesses Dry

Katherine Pankow

Code Sections Affected

Business and Professions Code § 6106.2 (amended); Civil Code §§ 55.31, 55.32, 55.545, 1938 (new), §§ 55.3, 55.52, 55.53, 55.54, 55.56 (amended); Code of Civil Procedure § 425.50 (new); Government Code §§ 4465, 4467, 4469, 4470, 8299.06, 8299.07, 8299.08 (new), §§ 4459.8, 8299.05 (amended); Health and Safety Code § 18944.15 (new).
SB 1186 (Steinberg); 2012 STAT. Ch. 383.

I. INTRODUCTION

Nobody is as good at winning lawsuits against disability-access violators as attorney Thomas Frankovich.¹ A recent issue of *California Lawyer* features a full-page photo of Frankovich shouldering a pair of crutches like a shotgun, the fringe of his signature elk-skin coat dangling from his arms.² The spines of several *California Practice Guides* serve as his wilderness backdrop.³ He closes one eye as if taking aim, and prepares to fire.⁴ It is not clear what sort of fictional target he is aiming at,⁵ but some critics assert that Frankovich has been directing far too much firepower at small businesses.⁶ In fact, Frankovich's website features a cartoon of him commandeering a tank dubbed the "Access Blaster" that is adorned with handicap wheelchair symbols.⁷ Clad in a cowboy hat, he talks on a telecommunications device for the deaf (TDD) phone from atop the

1. See Ron Russell, *Wheelchairs of Fortune*, S.F. WKLY. (July 25, 2007), <http://www.sfweekly.com/2007-07-25/news/wheelchairs-of-fortune> (on file with the *McGeorge Law Review*) (citing attorney Craig Beardsley, who has been on the opposing end of many cases with Frankovich, as stating that "no one has mastered it better than Tom Frankovich," and noting that Frankovich is one of the most feared attorneys at the ADA plaintiffs' bar).

2. Tom McNichol, *Targeting ADA Violators*, CAL. LAW., Jan. 2012, at 20.

3. *Id.*

4. *Id.*

5. *Id.*

6. See, e.g., Lauren Smiley, *Disabled Man Sues Restaurant, Returns for Empanadas*, S.F. WKLY. (Aug. 13, 2010, 10:59 AM), http://www.blogs.sfweekly.com/thesnitch/2010/08/disable_man_suing_chile_lindo.php (on file with the *McGeorge Law Review*) (discussing a spate of lawsuits brought by Frankovich against small eateries in the Mission district of San Francisco).

7. THOMAS E. FRANKOVICH, A PROF. LAW CORP., <http://www.disabilitieslaw.com> (last visited July 13, 2012) (on file with the *McGeorge Law Review*).

2013 / Civil

Access Blaster and plows over the remnants of a restroom while fireworks with the words “ADA” and “Title 24” explode in the background.⁸

Clients praise Frankovich as a civil-rights enforcer who goes to battle against businesses that would rather ignore issues related to equal access for the disabled.⁹ In a thirteen-year span, Frankovich filed more than one-thousand cases on behalf of about a dozen clients.¹⁰ However, not all observers believe that Frankovich’s legal pursuits are based on the desire to preserve civil liberties.¹¹ For example, some commentators note that Frankovich generally collects more in fees than his clients do in damages.¹²

In January of 2011, Frankovich appeared on Ronn Owens’ radio show on KGO 890 AM in San Francisco to explain his views on lawsuits based on violations of the Americans with Disabilities Act (ADA).¹³ Owens took calls from a slew of seething listeners, and Ken in Concord was first on the line.¹⁴ He called Frankovich a “charlatan,” characterized the lawsuits that Frankovich brought against two of the caller’s immediate family members as “total shakedowns,” accused Frankovich of basing his practice on “sucking money out of people,” and topped off the verbal barrage by asserting that Frankovich is a vampire.¹⁵ In 2005, a federal judge offered a similar take on Frankovich, declaring that his legal practice “border[s] on extortionate shysterism.”¹⁶

California’s courts attract Frankovich and attorneys like him because state law permits successful plaintiffs to recover money damages.¹⁷ The few law firms in this “cottage industry” often recruit disabled persons to hunt for ADA violations at multiple businesses.¹⁸ Once a disabled person encounters a violation,

8. *Id.*

9. See Russell, *supra* note 1 (citing Patrick Connally, the host of a weekly public interest show on KUSF and client of Frankovich, who describes the attorney as “someone at the forefront of the disability rights struggle”). In fact, Frankovich has a fondness for military history, and stated that “[a legal fight is] going to be like Patton on his way to Berlin. If you don’t go ahead and get it taken care of, Big Bertha is going to level the guns and clear the decks.” Smiley, *supra* note 6.

10. Russell, *supra* note 1.

11. See, e.g., Sarah B., *KGO Interviews ADA Litigator; Pot de Pho Is Latest Casualty Among Dozens Being Sued as Recently as This Week. Where is Eric Mar?*, RICHMOND DISTRICT S.F. (Jan. 14, 2011, 12:13 AM), <http://richmondsfblog.com/2011/01/14/kgo-interviews-ada-litigant-pot-de-pho-is-latest-casualty-among-dozens-being-sued-where-is-eric-mar/> [hereinafter *KGO Interviews*] (on file with the *McGeorge Law Review*) (audio clip downloaded using Adobe Flash Player) (discussing a radio interview with Frankovich during which the host and callers criticize his practices).

12. McNichol, *supra* note 2, at 24. One attorney who accessed Frankovich’s settlement documents found that in a typical \$20,000 settlement, Frankovich’s clients would usually end up receiving \$4,000 and Frankovich kept most of what was left. According to Frankovich, he bills at a rate of \$500 per hour. *Id.*

13. *KGO Interviews*, *supra* note 11.

14. *Id.*

15. *Id.*

16. *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924, 937 (C.D. Cal. 2005).

17. Alan J. Gordee, *Curbing Extortionate Shysterism in ADA Litigation*, ORANGE CNTY. LAW., Nov. 2005, at 38.

18. See Linda H. Wade & Timothy J. Inacio, *A Man in a Wheelchair and His Lawyer Go into a Bar*:

McGeorge Law Review / Vol. 44

she may file a lawsuit, and the defendant business owner must settle or risk a large damage award in court.¹⁹ Most business owners choose to settle.²⁰ Consequently, numerous business groups have demanded that California's legislature protect businesses from these practices.²¹ The legislature enacted Chapter 383 to alleviate the problem of ADA abuse in California.²²

II. LEGAL BACKGROUND

This section examines the extent to which federal and state laws govern disability-access law in California.²³

A. Federal Law

Under federal law, it is illegal for a person who operates a place of public accommodation to discriminate against any person based on their disability.²⁴ The ADA declares that disabled individuals are entitled to the full benefit and access to the goods, services, and privileges of a public accommodation.²⁵

B. California Law

California law supplies its own unique measures to supplement the ADA.²⁶ California's counterpart to the ADA is the Unruh Civil Rights Act (Unruh Act).²⁷ The Unruh Act is broader and more generous to plaintiffs.²⁸ California also has provisions separate from the Unruh Act that set forth specific access-related

Serial ADA Litigation Is No Joke, TRIAL ADVOC. Q., Fall 2006, at 32–33 (illustrating such recruitment with an excerpt from a plaintiff's attorney's website highlighting the various businesses that might violate the ADA).

19. *Id.* at 33.

20. *Id.*

21. Torey Van Oot, *Disability-Access Legal Threats Spur Legislation to Protect Business*, SACRAMENTO BEE (June 26, 2012), <http://www.sacbee.com/2012/06/25/4586189/disability-access-legal-threats.html#> (on file with the *McGeorge Law Review*).

22. *E.g.*, CAL. CIV. CODE §§ 55.31, 55.56(f)(1)–(2) (amended by Chapter 383); CAL. CIV. PROC. CODE § 425.50 (enacted by Chapter 383); CAL. GOV'T CODE § 8299.05(a) (amended by Chapter 383).

23. *E.g.*, 42 U.S.C. § 12182(a) (2006) (codifying federal law); CIV. § 51 (West 2007 & Supp. 2012) (codifying state law).

24. 42 U.S.C. § 12182(a).

25. *Id.*

26. *E.g.*, CIV. § 51; *id.* § 54 (West 2007).

27. *Id.* § 51 (West 2007 & Supp. 2012).

28. Compare *id.* § 54.3(a) (West 2007) (authorizing money damages for Unruh Act violations), with 42 U.S.C. §§ 12182, 2000-3(b) (authorizing injunctive relief for ADA violations); see also *A.R. v. Kogan*, 964 F. Supp. 269, 271 (N.D. Ill. 1997) (holding that the ADA does not allow the plaintiff to recover monetary damages because relief under the ADA is limited to the remedies set forth in 42 U.S.C. § 2000a-3, which only provides injunctive relief).

2013 / Civil

requirements that address persons with disabilities.²⁹ Additionally, California has an agency that addresses disability access issues.³⁰ This section addresses the procedural remedies that can apply to defendants in access-related claims, various requirements related to damages a plaintiff may recover, and concludes with a comparison of California law to federal law.

1. *The Unruh Civil Rights Act*

The Unruh Act provides broad anti-discrimination protection.³¹ It declares that all people are entitled to equal access to public accommodations regardless of their disabilities.³² It declares that a violation under the ADA is also a violation under the Unruh Act.³³ Unruh Act violators are liable for no less than \$4,000, up to three times the amount of actual damages, and attorney's fees.³⁴ The Unruh Act permits a plaintiff to recover damages even if the defendant business owner's violation was unintentional.³⁵ Despite the Unruh Act's harsh penalties, the California Legislature subsequently determined that the denial of equal access to disabled individuals remained a pervasive problem.³⁶ In response, the legislature created the California Commission on Disability Access to facilitate compliance and develop additional regulations.³⁷

2. *Additional Protections*

Section 54 of the California Civil Code requires applicable parties to give individuals with disabilities the same access to places of business, housing accommodations, transportation, sidewalks, streets, and other places open to the general public.³⁸ Section 54.1 requires owners of rented or leased housing accommodations to provide equal access to disabled individuals.³⁹ Under section

29. CIV. §§ 54(a), 54.1.

30. CAL. GOV'T CODE § 8299 (West Supp. 2012) (creating the California Commission on Disability Access).

31. CIV. § 51 (West 2007 & Supp. 2012).

32. *Id.* § 51(b).

33. *Id.* § 51(f). The Unruh Act also provides that operators of public accommodations may not deny equal access to individuals based on their race, sex, national origin, and sexual orientation. *Id.* § 51(b).

34. *Id.* § 52(a).

35. *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 678, 94 Cal. Rptr. 3d 685, 698 (2009) (holding that the plaintiff in a disability access claim does not need to prove intentional discrimination to recover damages from the defendant).

36. CAL. GOV'T CODE § 8299 (West Supp. 2012).

37. *Id.*

38. CIV. § 54(a). A violation of the ADA is also a violation of section 54. *Id.* § 54(c).

39. *Id.* § 54.1(b)(1).

McGeorge Law Review / Vol. 44

54.1, access is equal if it meets the requirements of ADA titles II and III.⁴⁰ A violation of the ADA is a violation of section 54.1.⁴¹

3. *Procedure in Access-Related Claims: Advisories, Stays, and Evaluation Conferences*

California law regulates procedure in construction-related accessibility claims.⁴² It requires attorneys who serve a demand or complaint on a violator to also serve a separate advisory notice.⁴³ If the defendant qualifies for a stay and early evaluation conference, the court may stay the proceedings for ninety days unless the plaintiff has already obtained temporary injunctive relief.⁴⁴ The court must also schedule a mandatory early evaluation conference no later than fifty days after it issues the order.⁴⁵ The defendant must file a copy of the Certified Access Specialist (CAsp) inspection at least fifteen days before the conference.⁴⁶ In that same timeframe, the plaintiff must file and serve a list of the specific violations on the defendant's property, the amount of damages that the plaintiff is requesting, and the current amount of attorney's fees and costs.⁴⁷ The court may lift or extend the stay upon a showing of good cause by either party, and the CAsp report is not binding on the court.⁴⁸

4. *The Plaintiff's Recovery*

When determining how much to award in attorney's fees, a court may consider any settlement offers a party made or rejected.⁴⁹ Otherwise, settlement offers are generally inadmissible under the Evidence Code.⁵⁰ The plaintiff can only recover attorney's fees if she personally encountered the violation on the

40. *Id.* § 54.1(a)(3).

41. *Id.* § 54.1(d).

42. *Id.* § 55.3(b) (West Supp. 2012). A construction-related accessibility claim asserts that the defendant failed to adhere to a statutory access standard regarding the construction of a business that is open to the public. *Id.* § 55.3(a)(3).

43. *Id.* § 55.3(b). The advisory notifies the defendant of her legal rights and obligations, and informs the defendant that she is not required to pay the plaintiff unless a court finds her to be liable. *Id.* It also explains that the defendant may be able to obtain a court stay and early evaluation conference if a certified access specialist previously conducted an inspection on the property at issue. *Id.* §§ 55.3(a)(3), 55.54.

44. *Id.* § 55.54(d)(1). A "qualified defendant" is a defendant in a construction-related accessibility claim who is able to obtain a stay and early evaluation, if she obtained an inspection by a CAsp before the plaintiff served her with a summons and complaint, and the CAsp determined that the property was compliant with all of the related standards. *Id.* § 55.52(a)(8).

45. *Id.* § 55.54(d)(2).

46. *Id.* § 55.54(d)(4).

47. *Id.* § 55.54(d)(6).

48. *Id.* § 55.54(d)(2)–(3).

49. *Id.* § 55.55.

50. *Id.*

2013 / Civil

defendant's property or if the defendant's violation deterred the plaintiff from using the defendant's property.⁵¹

5. California Law as Compared to the ADA

California law offers drastically different relief than the ADA.⁵² A business owner who violates the rights of a disabled person in California pursuant to section 54.1 can be liable for monetary damages of no less than \$1,000, treble damages, plus attorney's fees, and all without factoring in any damages that the Unruh Act might prescribe.⁵³ The ADA, on the other hand, only allows for injunctive relief and reasonable attorney's fees.⁵⁴

III. CHAPTER 383

Chapter 383 reduces the minimum damages under the Unruh Act if the defendant meets certain criteria.⁵⁵ When a court determines statutory damages, it must evaluate "the reasonableness of the plaintiff's conduct"⁵⁶ Chapter 383 also prohibits attorneys or individuals who are implementing an attorney's advice from issuing demands for money, although the demand letter may still include "prelitigation settlement negotiations."⁵⁷

Chapter 383 imposes new requirements on demand letters, including that an attorney must submit a copy to the State Bar of California of every demand letter they send.⁵⁸ Furthermore, Chapter 383 requires attorneys to include additional information in the advisories that they serve along with any complaint or settlement demand in a construction-related accessibility claim.⁵⁹ In general, the advisory informs the recipient of her legal rights and liabilities.⁶⁰ Courts may subject attorneys who do not comply with Chapter 383 to disciplinary actions or sanctions.⁶¹

51. *Id.* § 55.56(a)–(d).

52. *Id.* § 54.3(a); 42 U.S.C. §§ 12182, 2000a-3(b) (2006).

53. Civ. § 54.3(a).

54. 42 U.S.C. §§ 12182, 2000a-3(b); *see also* A.R. v. Kogan, 964 F. Supp. 269, 271 (N.D. Ill. 1997) (holding that the ADA does not allow the plaintiff to recover monetary damages because relief under the ADA is limited to the remedies set forth in 42 U.S.C. § 2000a-3, which only provides injunctive relief).

55. Civ. § 55.56(f)(1)–(2) (amended by Chapter 383).

56. *Id.* § 55.56(h) (amended by Chapter 383).

57. *Id.* § 55.31(b) (enacted by Chapter 383). A "demand for money" includes oral and written statements requesting money from the defendant prior to litigation based on the alleged accessibility violation. *Id.*

58. *Id.* § 55.32(a)(1)–(2) (enacted by Chapter 383).

59. *Id.* § 55.3(b) (amended by Chapter 383).

60. *Id.*

61. *Id.* § 55.31(d)(1) (enacted by Chapter 383); CAL. BUS. & PROF. CODE § 6106.2 (enacted by Chapter 383).

McGeorge Law Review / Vol. 44

Chapter 383 also requires owners of commercial property to state on the lease form or rental agreement whether their property is CASp-inspected,⁶² and it implements a number of additional measures to facilitate inspections.⁶³ It requires the State Architect to review its fees on a regular basis and prohibits the State Architect from charging more than \$250 for certain applications.⁶⁴ Chapter 383 mandates that local governments charge an additional \$1 fee for business licenses and establishes a revolving fund to store the revenues of that fee.⁶⁵ It also prioritizes the responsibilities of the California Commission on Disability Access.⁶⁶ Lastly, Chapter 383 contains various uncoded legislative findings.⁶⁷

IV. ANALYSIS

Chapter 383 addresses three broad areas of ADA litigation: damage and procedural controls, attorney controls, and compliance facilitation.⁶⁸ Chapter 383 implements procedural and damage-related controls by providing for new statutory minimums and amending the stays and evaluation conferences.⁶⁹ It implements controls on attorneys by providing new rules on demand letters and prohibiting money demands.⁷⁰ Finally, Chapter 383 implements compliance-facilitation components such as new rules on commercial property owners, new controls on the State Architect, and a one-dollar fee charged on business license applications.⁷¹

62. CIV. § 1938 (enacted by Chapter 383).

63. *E.g.*, CAL. GOV'T CODE § 4459.8(b)(2) (amended by Chapter 383) (mandating periodic review of fees required for the "certified access specialist program"); *id.* §§ 4465–69 (enacted by Chapter 383) (establishing a revolving fund and providing ways to raise money for that fund).

64. *Id.* § 4459.8 (b)(2) (enacted by Chapter 383).

65. *Id.* § 4467(a) (enacted by Chapter 383).

66. *Id.* § 8299.05(a) (amended by Chapter 383). Chapter 383 charges the Commission with "preventing or minimizing problems of compliance" by providing outreach efforts and preparing a compliance guide on its website, recommending programs to ensure access to persons with disabilities, and providing information to the legislature. *Id.* § 8299.05(a)–(c).

67. 2012 Cal. Stat. ch. 383, §§ 25, 27. The legislature found that certain attorney practices coerced defendants into settling. *Id.* § 25. Additionally, they declared that compliance is a "matter of statewide concern." *Id.* § 27.

68. *E.g.*, CAL. CIV. CODE §§ 55.31, 55.56(f)(1)–(2) (amended by Chapter 383); CAL. CIV. PROC. CODE § 425.50 (enacted by Chapter 383); GOV'T § 8299.05(a) (amended by Chapter 383).

69. CIV. § 55.545 (enacted by Chapter 383); *id.* § 55.56(f)(1)–(2) (amended by Chapter 383).

70. *Id.* §§ 55.31(c), 55.32(a) (enacted by Chapter 383).

71. *Id.* § 1938 (enacted by Chapter 383); GOV'T § 4459.8(b)(2) (amended by Chapter 383); *id.* §§ 4467(a), 8299.08 (enacted by Chapter 383).

2013 / Civil

A. Relevant Legal Changes

1. Damage and Procedural Controls

a. Minimum Statutory Damages

Most notably, Chapter 383 reduces a defendant's liability for minimum statutory damages in ADA-related claims to either \$1,000 or \$2,000 per offense, depending on the defendant's situation.⁷² To be eligible for the \$1,000 minimum, a defendant must prove that the access-related violations were remedied within sixty days of being served notice of the violations.⁷³ In addition, the premises must be "[i]nspected by a CASp" or otherwise "meet[] applicable standards."⁷⁴ A defendant must not have knowingly altered the property after the inspection in a way that impacted compliance.⁷⁵ A \$1,000 damage minimum can also apply if the defendant's property was "new construction" that the local building department approved after January 1, 2008 and the violations are remedied within sixty days.⁷⁶ Otherwise, a defendant qualifies for the \$2,000 minimum if she satisfies the statutory definition of a "small business" and corrects the violation within thirty days of being served notice.⁷⁷

The courts also have an additional control over damages.⁷⁸ When a plaintiff claims that she encountered a barrier to access multiple times on different dates, the court can now take the reasonableness of her actions into account based on the rule on mitigation of damages.⁷⁹

72. Civ. § 55.56(f)(1)–(2) (amended by Chapter 383). It should be noted that this provision does not apply if the defendant's violation is intentional. *Id.* § 55.56(f)(1)(D)(2) (amended by Chapter 383); *see also* *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 678, 94 Cal. Rptr. 3d 685, 698 (2009) (holding that a plaintiff can collect statutory damages in an ADA lawsuit irrespective of the defendant's intent).

73. Civ. § 55.56(f)(1) (amended by Chapter 383).

74. *Id.* § 55.56(f)(1)(A)–(B) (amended by Chapter 383). The "meets applicable standards" category applies if a CASp inspected the site and concluded that the site complied with accessibility standards. *Id.* § 55.52(a)(4) (amended by Chapter 383). The site is "inspected by a CASp" if the site was inspected, but the CASp still needs to decide whether the site complies with accessibility standards. *Id.* § 55.52(a)(5) (amended by Chapter 383). If the CASp determined that the defendant's property violated access standards, the defendant can still qualify for the \$1,000 statutory minimum if she took reasonable action to remedy the violations before the plaintiff encountered the violation, or she was actively correcting the violation when the plaintiff encountered it. *Id.* § 55.56(f)(1)(B) (amended by Chapter 383).

75. *Id.* § 55.56(f)(1)(A) (amended by Chapter 383).

76. *Id.* § 55.56(f)(1)(C) (amended by Chapter 383).

77. *Id.* § 55.56(f)(2) (amended by Chapter 383). A "small business" is a business that employed less than twenty-five employees and made less than \$3.5 million over the past three years. *Id.*

78. *Id.* § 55.56(h) (amended by Chapter 383).

79. *Id.*

*McGeorge Law Review / Vol. 44**b. Procedural Controls*

Chapter 383 makes procedural changes to construction-related accessibility litigation in California.⁸⁰ First, the legislature altered the requirements for the complaint.⁸¹ The attorney is still required to give the defendant an advisory with each complaint, but the terms of the advisory must now include information about the new minimum-liability scheme established in Section 55.56 of the Civil Code.⁸² Furthermore, the complaint must allege each violation with a similar degree of specificity that is required for demand letters.⁸³ Finally, the plaintiff must verify the complaint.⁸⁴ If a defendant does not qualify for an early evaluation conference based on the existing provisions of the Civil Code, she can try to get a mandatory evaluation conference instead.⁸⁵

c. Attorney Controls

Chapter 383 prohibits attorneys or anyone acting on an attorney's advice from issuing demands for money to building owners, tenants, or their agents or employees.⁸⁶ Chapter 383 subjects attorneys issuing demand letters to various new requirements.⁸⁷ Namely, attorneys issuing demand letters must include their State Bar license numbers in the letters and must also send copies of the letters to the State Bar of California.⁸⁸ The attorney must include a written advisory to the violator with each demand letter.⁸⁹

80. *E.g.*, CAL. CIV. PROC. CODE § 425.50 (enacted by Chapter 383) (stating that a plaintiff's accessibility claim must "state facts sufficient to allow a reasonable person to identify the basis of the violation").

81. *Id.*

82. CIV. § 55.3(b) (enacted by Chapter 383); *see also id.* § 55.56(f)(1)–(2) (amended by Chapter 383) (amending the minimum-liability scheme).

83. *Compare* CIV. PROC. § 425.50 (enacted by Chapter 383) (providing complaint requirements), *with* CIV. § 55.31 (enacted by Chapter 383) (providing demand letter requirements). In other words, a detailed explanation of each and every barrier that the defendant came across, the dates of each encounter, and the way that the barrier resulted in the denial of equal access must all be in the complaint. CIV. PROC. § 425.50 (enacted by Chapter 383).

84. CIV. PROC. § 425.50 (enacted by Chapter 383).

85. CIV. § 55.545 (enacted by Chapter 383).

86. *Id.* § 55.31(c) (enacted by Chapter 383). However, the parties are still allowed to hold settlement discussions prior to litigation if they have already reached an agreement on making repairs to the violation at issue. *Id.* § 55.31(e) (enacted by Chapter 383). The prohibition does not apply when the claim involves physical injury and special damages. *Id.* § 55.31(f) (enacted by Chapter 383).

87. *Id.* § 55.32(a) (enacted by Chapter 383).

88. *Id.* § 55.32(a)(1)–(2) (enacted by Chapter 383). Another copy of the letter must be sent to the California Commission on Disability Access. *Id.* § 55.32(a)(3) (enacted by Chapter 383). Both the State Bar and the Commission must receive the copies within five business days. *Id.* § 55.32(c) (enacted by Chapter 383).

89. *Id.* § 55.3(b) (amended by Chapter 383). The advisory instructs the defendant that building owners must comply with disability access laws, but that they are not required to pay any money until a court decides that they are liable. *Id.* The form suggests that the defendant seek legal counsel, and tells the defendant that the attorney issuing the demand letter should have included their State Bar Number in the letter. *Id.* It also

2013 / Civil

Beginning January 1, 2013, the demand letter must include sufficient information such that a reasonable person could understand the grounds of the plaintiff's claim.⁹⁰ It must include details and dates of every encounter with an accessibility violation, if there is more than one.⁹¹ Attorneys who violate any of Chapter 383's requirements may be subject to disciplinary action.⁹² The provisions that act as controls on attorney behavior are geared toward the prevention of "stacking"⁹³ and "milling."⁹⁴

2. Compliance Facilitation

a. New Requirements for Commercial Property Owners

Chapter 383 imposes new requirements on commercial property owners: a property owner must indicate whether her property is CASp-inspected and must also include the results of the inspection on each tenant's lease or rental agreement.⁹⁵

b. Regulation of the State Architect

Chapter 383 amends the Government Code to facilitate CASp inspections.⁹⁶ First, it requires the State Architect to determine whether state fees levied for purposes of the CASp program are reasonable.⁹⁷ However, the State Architect should ensure that the fees cover the costs the state government incurs from running the CASp program.⁹⁸ Additionally, certain application fees may not exceed \$250.⁹⁹

encourages the defendant to provide a copy of the letter to the State Bar. *Id.*

90. *Id.* § 55.31(a)(1) (enacted by Chapter 383).

91. *Id.*

92. *Id.* § 55.31(d)(1) (enacted by Chapter 383); CAL. BUS. & PROF. CODE § 6106.2 (enacted by Chapter 383). Under Chapter 383's new addition to the Business and Professions Code, the State Bar of California can discipline attorneys starting January 1, 2013 for failing to comply with the various provisions of the Civil Code. *Id.* The section will automatically be repealed on January 1, 2016 unless the legislature intervenes. *Id.*

93. "Stacking" occurs when the plaintiffs claim that they encountered access barriers on multiple occasions at the same location, so they multiply the statutory damages by the number of visits. SENATE JUDICIARY COMMITTEE, ANALYSIS OF SB 1186, at 14 (Aug. 31, 2012).

94. "Milling" arises when an attorney brings virtually identical claims for the same plaintiff against multiple businesses. *Id.* at 15.

95. CIV. § 1938 (enacted by Chapter 383).

96. CAL. GOV'T CODE § 4459.8(b)(2) (amended by Chapter 383).

97. *Id.*

98. *Id.*

99. *Id.* The applications that the statute covers are those for licensed architects, landscape architects, civil engineers, and structural engineers. *Id.*

*McGeorge Law Review / Vol. 44**c. Business License Application Increase and the New Revolving Fund*

Chapter 383 adds a new chapter to the Government Code.¹⁰⁰ Section 4465 creates a Disability Access and Education Revolving Fund that, according to the codified legislative intent of the statute, is meant to heighten compliance with disability-access standards.¹⁰¹ Anyone who applies for or renews a business license pays a \$1 fee into the fund.¹⁰² Chapter 383 requires local governments to report back to the legislature regarding the fees they collect and to disseminate sources of information on compliance to anyone who applies for or renews a business license.¹⁰³

d. Expansion of the Commission on Disability Access

To facilitate compliance and education, Chapter 383 expands the role of the Commission on Disability Access.¹⁰⁴ Besides providing information, the Commission may “recommend, develop, prepare, or coordinate” its own projects.¹⁰⁵ The Commission will work with other state agencies to meet its overriding purpose of furthering disability-access education.¹⁰⁶ Additionally, the Commission will analyze the demand letters and complaints that it receives and will post the resulting data on its website.¹⁰⁷

B. Objective Critique of Chapter 383

California’s political process has seen the birth and death of at least eight bills related to ADA litigation in the past eight years.¹⁰⁸ Each of those bills attempted to create notice requirements that allowed a business owner some time

100. *Id.* §§ 4465–69 (enacted by Chapter 383).

101. *Id.* § 4465 (enacted by Chapter 383).

102. *Id.* § 4467(a) (enacted by Chapter 383). The local government will keep seventy percent of the money it collects to pay for CASp-related services. *Id.* § 4467(b) (enacted by Chapter 383). It may use five percent to cover administrative costs. *Id.* The rest of the money is sent to the State Architect to be deposited into the Disability Access and Education Revolving Fund every quarter. *Id.* § 4467(c) (enacted by Chapter 383).

103. *Id.* § 4467(d) (enacted by Chapter 383); *id.* § 4469 (enacted by Chapter 383).

104. *Id.* § 8299.05 (amended by Chapter 383).

105. *Id.*

106. *Id.* § 8299.06 (enacted by Chapter 383).

107. *Id.* § 8299.08 (enacted by Chapter 383). The Commission will also report this information to the legislature each year. *Id.*

108. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1186, at 6 (July 3, 2012). Examples include SB 855, 2005 Leg., 2005–2006 Sess. (Cal. 2005) (as amended on Apr. 26, 2005, but not enacted), AB 2533, 2008 Leg., 2007–2008 Sess. (Cal. 2008) (as introduced on Apr. 28, 2008, but not enacted), and SB 783, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as amended on June 6, 2011, but not enacted). *Id.*

2013 / Civil

to cure any existing violations before the plaintiff could sue.¹⁰⁹ Each bill failed when it came before the Judiciary Committee of its respective house.¹¹⁰

Given this history of failure, it is not surprising that Chapter 383's author did not address the matter of monetary damages for successful plaintiffs, a matter that critics suggest factors heavily in the pervasiveness of ADA litigation in California.¹¹¹ The bill would have provided for a thirty-day right-to-cure period, but lawmakers struck that provision from the bill.¹¹² For that reason, Chapter 383's capacity to reduce litigation is questionable,¹¹³ and the policy goals of business groups like the California Restaurant Association¹¹⁴ remain unaddressed.¹¹⁵ However, by prohibiting demand letters, Chapter 383 did address one of the major complaints levied by various chambers of commerce and small businesses.¹¹⁶

Rather than provide a right-to-cure provision, as many business owners clamored for, Chapter 383 instead seems to apply a death-by-regulation approach.¹¹⁷ Arguably, Chapter 383's provisions impose so many requirements on attorneys who are filing ADA actions that the attorneys may wish to save themselves some serious headache and possible punishment by the State Bar of California and seek other legal work instead.¹¹⁸ Nonetheless, only a few attorneys

109. *Id.*

110. *Id.*

111. See, e.g., Letter from Diane Feinstein, U.S. Senator, to Darrell Steinberg, Senator, Cal. State Senate (Mar. 8, 2012) (on file with the *McGeorge Law Review*) ("It appears these suits and demand letters are driven by a unique California law that, unlike the federal ADA, permits the recovery of damages for noncompliance with the ADA.").

112. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1186, at 8 (July 3, 2012). The provision was struck because right-to-cure provisions are seen as "controversial and potentially difficult to implement." *Id.*

113. See Gary Honeycutt, *Abusive ADA Lawsuits Must Be Stopped*, FRESNO BEE, Oct. 6, 2011, available at 2011 WLNR 20517470 (on file with the *McGeorge Law Review*) ("The simple solution to this problem [of lawsuit abuse] is to allow a defendant in an ADA lawsuit an opportunity to correct a violation voluntarily before the plaintiff may commence a civil action and force the business owner to incur legal costs.").

114. ADA, CAL. REST. ASS'N, <http://www.calrest.org/issues-policies/key-issues/ada1/> (last visited Jan. 1, 2013) (on file with the *McGeorge Law Review*). The California Restaurant Association states that its "policy priority" is to "seek options for common-sense reforms to California law that would provide business owners with an appropriate timeframe in which to make modifications without being held liable for accessibility violations." *Id.*

115. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1186, at 8 (July 3, 2012) (listing the California Restaurant Association as a registered supporter of SB 1186, but discussing the notice provision that Chapter 383's authors decided to delete).

116. See Letter from Diane Feinstein, *supra* note 111 (stating that various chambers of commerce and small businesses complained about "predatory lawsuits" and "coercive demand letters").

117. CAL. CIV. CODE §§ 1938, 55.32 (enacted by Chapter 383); *id.* § 55.3(b) (amended by Chapter 383); CAL. BUS. & PROF. CODE § 6106.2 (enacted by Chapter 383).

118. See CIV. § 55.32 (enacted by Chapter 383) (placing controls on demand letters); *id.* § 55.3(b) (amended by Chapter 383) (requiring advisory letters); *id.* § 1938 (enacted by Chapter 383) (notifying lessors and renters of ADA compliance requirements); BUS. & PROF. § 6106.2 (enacted by Chapter 383) (placing sanctions on violators).

McGeorge Law Review / Vol. 44

are likely to be deterred because ADA litigation will continue to provide opportunities for substantial financial returns.¹¹⁹

It remains to be seen whether the death-by-regulation approach will have counteractive effect and actually kill business.¹²⁰ It appears that businesses are actually financing their own salvation when they pay their business license fee (and thus pay \$1 into the Disability Access Education Revolving Fund); however, if Chapter 383 is meant to alleviate financial burden on businesses, then this responsibility seems to be misplaced.¹²¹ Many business owners hoped that new legislation would “simplify[] ADA regulation.”¹²² They will likely be dismayed when they wrap their hands around the twenty-seven pages of unwieldy language in Chapter 383.¹²³ In fact, Chapter 383 may provoke litigation; like Pavlov’s dog, attorneys are sure to salivate when they hear phrases like “reasonable measures”¹²⁴ and “to the best of the defendant’s knowledge.”¹²⁵

It is worth noting that Chapter 383 only punishes attorneys who violate its provisions, even though its prohibitions apply to both attorneys and any “person acting at the direction of an attorney.”¹²⁶ Many of the groups that are in favor of

119. See Civ. § 55.56(f)(1) (amended by Chapter 383) (imposing a minimum for statutory damages at \$1,000 for certain claims); *id.* § 55.56(f)(2) (amended by Chapter 383) (imposing a minimum for statutory damages at \$2,000 for certain claims); see also Amy Crawford, *Chiu Proposal Could Curb Costly ADA Disability Access Lawsuits in San Francisco*, S.F. EXAMINER (Sept. 26, 2011), <http://www.sfexaminer.com/local/2011/09/chiu-proposal-could-curb-costly-ada-disability-access-lawsuits> (on file with the *McGeorge Law Review*) (stating that the average cost of a settlement in an ADA lawsuit was between \$25,000 to \$40,000). Subtracting a potential \$3,000 from even a \$25,000 settlement, assuming that a single violation is alleged, would not seem to hurt an attorney’s bottom line enough to dissuade him or her from pursuing legal action. See Civ. § 55.56(f)(1) (amended by Chapter 383) (imposing a minimum for statutory damages at \$1,000 for certain claims); *id.* § 55.56(f)(2) (amended by Chapter 383) (imposing a minimum for statutory damages at \$2,000 for certain claims).

120. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1186, at 14–17 (Aug. 31, 2012) (explaining that Chapter 383 regulates the contents of the complaint and demand letter and requires attorneys to submit copies of the demand letter to the State Bar of California for inspection).

121. CAL. GOV’T CODE § 4467(a) (enacted by Chapter 383); see also SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1186, at 13 (Aug. 31, 2012) (stating that the legislation is meant to alleviate the financial burden of ADA litigation on businesses who make good-faith efforts to comply with the law).

122. Honeycutt, *supra* note 113.

123. See *id.* (noting that businesses were hoping for simpler ADA provisions); SB 1186, 2012 Leg., 2011–2012 Sess. (Cal. 2012) (as amended on Aug. 30, 2012, but not enacted).

124. See Civ. § 55.56(f)(1)(B) (amended by Chapter 383) (providing that the defendant can qualify for the \$1,000 statutory minimum if they “implemented reasonable measures to correct the alleged violation” before the plaintiff encountered it).

125. See *id.* § 55.56(f)(1)(A) (amended by Chapter 383) (providing that the defendant can qualify for the \$1,000 statutory minimum if “to the best of the defendant’s knowledge, there were no modifications or alterations that impacted compliance . . .”).

126. See *id.* § 55.31(c)–(d) (enacted by Chapter 383) (applying prohibitions to non-attorneys, but making only attorneys accountable to the State Bar).

2013 / Civil

clamping down on ADA litigation blame unscrupulous attorneys,¹²⁷ but the prohibition on its own may not deter non-attorney, pro se litigants.¹²⁸

Chapter 383 provides small-business owners with notice as to whether property they are interested in leasing has received a CASp inspection.¹²⁹ This provision would seem to assist business owners' leasing decisions.¹³⁰ But that would only be the case if the business owner is already familiar with CASp inspections because the provision does not require the building owner to explain what a CASp inspection is.¹³¹ It is also possible for a building owner to obtain a CASp inspection that reveals the building's noncompliance.¹³² Chapter 383 does not require the building owner to conduct a CASp inspection or to correct any discovered defects.¹³³ Thus, business owners may incur liability when they sign leases and subsequently establish their business in a noncompliant building.¹³⁴

Much of the disability advocates' published criticism focused on the right-to-cure provision in the bill.¹³⁵ Even though the right-to-cure provision was struck, advocates can still argue that Chapter 383 is flawed because it does not help businesses achieve compliance.¹³⁶ Disability-rights advocates argue that the best way to decrease lawsuits without chipping away at civil-rights protections is to assist businesses in complying with preexisting law.¹³⁷

127. See, e.g., Van Oot, *supra* note 21 (stating that proponents of the legislation hope that it will scale back the many lawsuits filed by a handful of attorneys).

128. CIV. § 55.31 (b) (enacted by Chapter 383); George Warren, *Disabled Attorney Defends His 1,000+ ADA Lawsuits*, ABC NEWS 10 (Feb. 25, 2010), <http://www.news10.net/news/local/story.aspx?storyid=76046> (on file with the *McGeorge Law Review*). Attorney Scott Johnson of Sacramento is a quadriplegic who files ADA claims on his own behalf. *Id.*

129. CIV. § 1938 (enacted by Chapter 383).

130. See Editorial, *Our View: Bills Would Stop ADA Letter Abuse*, MERCED SUN-STAR, June 11, 2012, available at 2012 WLNR 12201713 (on file with the *McGeorge Law Review*) ("That way, the small business would know what they're getting into . . .").

131. CIV. § 1938 (enacted by Chapter 383).

132. See *id.* § 55.52(a)(8) (West Supp. 2012) (stating that a person is a "qualified defendant" if she has previously conducted a CASp inspection and the inspector determined that their property was compliant).

133. See *id.* § 1938 (enacted by Chapter 383) (lacking any language that would require a building owner to state the outcome of a CASp inspection on a lease agreement).

134. See *id.* § 52 (West 2007). "Whoever denies, aids or incites a denial, or makes any distinction contrary to Section 51 . . . is liable for each and every offense . . ." *Id.* (emphasis added). Thus, the Civil Code makes no distinction between lessees and owners, so a lessee can incur liability when they sign a lease and establish their business in a building that is not compliant. *Id.*

135. See Press Release, National Federation of the Blind of California Opposes S.B. 1186 (June 5, 2012) (on file with the *McGeorge Law Review*) (noting that the right-to-cure provision was discriminatory because it required the disabled individual to "jump through additional legal hoops" to bring a claim).

136. See Margaret Jakobson-Johnson, *Another View: Delaying Lawsuits Isn't Fair to the Disabled*, SACRAMENTO BEE, May 20, 2012, at 2E (stating that ADA lawsuits are the result of business owners' noncompliance).

137. *Id.*

V. CONCLUSION

Chapter 383 will likely fail to satisfy parties on either side of the ADA litigation debate.¹³⁸ On the one hand, business owners and chambers of commerce who were hoping to drastically curb ADA lawsuits with a right-to-cure provision may dismiss Chapter 383 as insufficient, noting that the legislature declawed it when that provision was struck.¹³⁹ On the other, disability advocates will note that their goals of creating more compliance have gone by the wayside.¹⁴⁰ Certainly, it is also important to remember the human element that disability advocates represent, which is almost always involved in these cases.¹⁴¹ As for Thomas Frankovich's take on Chapter 383, it is less than favorable.¹⁴² It's "pretty ridiculous A high school kid could do a better job of writing a bill," he speculates.¹⁴³ Frankovich points out that the language in Chapter 383 indicates that a person can issue a demand letter so long as they file a complaint.¹⁴⁴ He continued, saying that the provision is counterproductive because filing and service cost up to \$1,000.¹⁴⁵ The purpose of settlement is to allow for a swift, efficient, and economical resolution, but if the plaintiff can issue a demand after the complaint is filed, the defendant would probably end up paying for those costs because they would be factored into the settlement amount.¹⁴⁶ Frankovich notes that the ADA has been in effect for twenty-two years as of July 26, 2012,¹⁴⁷ and therefore argues that owners have had ample time to make corrections.¹⁴⁸ If they have not yet made corrections, Frankovich believes that the owners simply need to pay the cost of the lawsuit since they made the choice to not repair the violations.¹⁴⁹

138. See Letter from Diane Feinstein, *supra* note 111 (noting that many business owners wanted to see a reduction ADA lawsuits); Jakobson-Johnson, *supra* note 136.

139. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1186, at 8 (July 3, 2012); Letter from Diane Feinstein, *supra* note 111.

140. Jakobson-Johnson, *supra* note 136; see also CAL. CIV. CODE § 55.31(b) (enacted by Chapter 383) (prohibiting demand letters for money but lacking any measures to facilitate compliance by business owners).

141. *What's at Stake*, CONCRETE CHANGE, <http://concretechange.org/visitability/whats-at-stake/> (last visited Sept. 29, 2012) (on file with the *McGeorge Law Review*). For example, being physically disabled can socially isolate a person. *Id.* When it comes to noncompliant and inaccessible locations, the disabled individual is given the choice of either turning down the opportunity to go out or subjecting themselves to embarrassment from things like falling on steps or worrying about not being able to access a restroom. *Id.*

142. Telephone Interview with Thomas Frankovich, Attorney, Thomas E. Frankovich, P.C. (July 18, 2012) (notes on file with the *McGeorge Law Review*).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

2013 / Civil

ADA litigation remains a heated issue in California, despite the fact that the ADA itself has been around for more than twenty years.¹⁵⁰ In light of the diluted, yet lengthy, provisions in Chapter 383 and the many failed attempts to create legislation on the issue, serious cutbacks on ADA litigation will likely not be immediately forthcoming.¹⁵¹

150. *E.g.*, McNichol, *supra* note 2, at 24 (quoting attorney Lynn Hubbard III's retort to critics asserting that he facilitates serial plaintiffs: "[h]ow about the McDonald's or Sears or Targets that you see so many ADA suits against? Are we going to call them serial defendants? You'd think after 20 years they would have gotten it right . . .").

151. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1186, at 6 (July 3, 2012).